

BINA PURI SDN BHD

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v.

EP ENGINEERING SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR

B

MOHAMAD ARIFF YUSOF J

[CIVIL SUITS NO: D-22NCC-293-2011

& D-24NCVC-483-2011]

20 MARCH 2012

CONTRACT: *Settlement - Settlement agreement - Whether breached - Defendant failing to pay monies due under settlement agreement - Whether defendant's obligation to pay subject to plaintiff's obligation to disclose and provide necessary documents - Whether requested documents in plaintiff's possession - Whether plaintiff's failure to provide documents amounted to total failure of consideration - Whether plaintiff's claim allowed*

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D

CONTRACT: *Breach - Agreement - Settlement agreement - Allegation of a fundamental breach - Whether defendant bound to pay arbitration fees and costs - Whether plaintiff failed to hand over promised documents - Whether requested documents in plaintiff's possession - Whether plaintiff's failure to provide documents amounted to total failure of consideration*

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The plaintiff (Bina Puri Sdn Bhd) and the defendant (EP Engineering Sdn Bhd) had entered into a settlement agreement. The plaintiff's claim against the defendant, in summary, was for the defendant to pay arbitration fees and costs which had been paid, or were due to be paid to the arbitrator in respect of an arbitration between the plaintiff, defendant and another party. The defendant claimed that it was not bound to pay the arbitration fees and costs because the plaintiff had failed to hand over certain promised documents to it pursuant to the settlement agreement and therefore, the plaintiff had committed a fundamental breach of the settlement agreement. The defendant had earlier paid a sum of RM26,400 on the basis that it was willing to pay the arbitrator's fees based on the condition that the plaintiff performed its obligations under the agreement. The defendant was now counterclaiming for a refund of the sum. The main issue to be tried was whether the plaintiff had fulfilled its obligations to hand over the said documents to the defendant.

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A Held (allowing plaintiff's claim; dismissing defendant's counterclaim):

- B (1)** The obligation to supply documents when requested was a condition of the settlement agreement. The obligation to disclose and provide the necessary documents was conditioned upon the plaintiff having actual possession of the documents. (paras 50 & 51)
- C (2)** Since it was the defendant that raised the issue of total failure of consideration, the burden was on the defendant to establish the issue. The evidence for the defendant to support its case was weak. Given the facts and circumstances, and the documentary and testimonial evidence seen in totality, it was more probable that the plaintiff's version of the facts was true, *ie*, the requested documents were not actually in its possession. (para 53)
- D (3)** The plaintiff had established its claim on a balance of probabilities. On this standard of proof, any commercially sensible purpose will conclude that the plaintiff had taken adequate steps to comply with its contractual obligations under the settlement agreement. It could not provide the documents requested in 2008 because these were not in its actual possession. But it did provide the documents in its possession in 2004, despite claims to the contrary by DW1, whose recollection of events was somewhat suspect. (para 59)
- E (3)**
- F (3)**

Case(s) referred to:

Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA (*refd*)

G Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor [2008] 3 CLJ 741 CA (*refd*)

Damansara Realty Berhad v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC (*refd*)

Legislation referred to:

H Contracts Act 1950, s. 40

For the plaintiff - Philip Chai; M/s Philip Chai & Co

For the defendant - Vincent Lim (S Ravenesan with him); M/s Dennis Nik & Wong

I Reported by Amutha Suppayah

JUDGMENT

A

Mohamad Ariff Yusof J:

Introduction And Procedural Background

[1] Two separate actions have been consolidated in this trial. In Civil Suit No. D-22NCC-293-2011, the plaintiff is Bina Puri Sdn Bhd (“Bina Puri”), whilst the defendant is EP Engineering Sdn Bhd (“EP Engineering”). In the second Civil Suit, ie, 24 NCVC-483-2011, EP Engineering is the plaintiff whilst Bina Puri is the defendant. Common issues of fact and law appearing both actions, hence the need to consolidate the second Civil Suit with the first.

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The Subject Matter Of The Dispute

[2] The subject matter of the dispute concerns a settlement agreement dated 27 April 2004 entered into between EP Engineering and Bina Puri. The plaintiff’s claim against the defendant, in summary, is for the defendant to pay arbitration fees and costs which have been paid, or due to be paid, to the arbitrator (Dato’ VC George) in respect of an arbitration between EP Engineering (as claimant) and Bina Puri (as 1st respondent) and another company called Kris Heavy Engineering and Construction Sdn Bhd (“KHEC”), together with statutory interest and costs.

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[3] The plaintiff’s claim in Civil Suit No. D-22NCC-293-2011 is succinct and short, as can be seen in the statement of claim:

Oleh yang demikian, Plaintiff menuntut daripada Defendan:

1. Jumlah wang sebanyak RM158,912.00 setakat 10.2.2011;
2. Perbelanjaan timbangtara yang dibayar kepada Dato’ VC George dari 10.2.2011 sehingga penyelesaian timbangtara tersebut yang akan ditafsirkan;
3. Faedah ke atasnya pada kadar 8% setahun bermula dari tarikh penghakiman sehingga ke tarikh penyelesaian sepenuhnya;
4. Kos tindakan ini; dan
5. Lain-lain relief yang Mahkamah Yang Mulia ini anggapkan patut dan suaimanfaat.

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- A **[4]** It is necessary for clarity to briefly outline the background facts leading to the arbitration proceedings and the settlement agreement. Bina Puri was part of the joint-venture between it and KHEC (“Bina Puri - KHEC joint-venture”) which was awarded a contract by the Malaysian Airline System Berhad for “The execution and completion of infrastructure works for Malaysian Airline System Berhad the Kuala Lumpur International Airport”. This was the principal contract. It concerns the construction of the MAS Cargo Complex.
- B
- C **[5]** There was a subcontract for the execution and completion of “the chilled water systems” forming part of the works awarded to the joint-venture under the principal contract. EP Engineering was the subcontractor for this portion of the works.
- D **[6]** The letter of award in respect of the principal contract between MAS and the joint-venture is dated 3 December 1996. The letter of award with respect to the subcontract for the Chilled Water Systems or Chilled Water Works (“CWW”) is dated 29 January 1997, and on the evidence this subcontract was awarded to EP Engineering by KHEC. See exh. P17.
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- F **[7]** For completeness it is necessary to mention another subcontract in relation to Domestic Water Works (“DWW”) for which the letter of award was entered into between EP Engineering and Bina Puri. See the evidence in chief of PW2 (Tan Kwe Hee, the Group Financial Director of Bina Puri), Q & A 2 and 3, notes of proceedings.
2. Q : Can you briefly let the Court know brief details of the two arbitrations?
- G A : The first arbitration was between the Defendant and the Plaintiff in respect of a subcontract for Domestic Water Works arbitrated before Dato’ George Seah (“the DW Arbitration”). The second arbitration which was commenced in March 1998 by the Defendant against the Plaintiff (as 1st Respondent) together with KRIS HEAVY ENGINEERING SDN BHD (“KHEC”) (as 2nd Respondent) is in respect of a subcontract for Chilled Water Works (“the CWW Arbitration”).
- H
- I 3. Q : Please confirm which arbitration the present case is in respect of.

A : The second arbitration before Dato' VC George and which is still not completed as at today.

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[8] Disputes under the sub-contracts having arisen, EP Engineering commenced arbitration proceedings on 9 March 1998 against Bina Puri as the 1st respondent and KHEC as the 2nd respondent in respect of the CWW. This CWW arbitration proceedings is the subject matter of the present suit.

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[9] There was an earlier arbitration commenced in respect of the DWW, but this was directly between EP Engineering and Bina Puri.

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[10] On the evidence, the first witness for the claimant in the CWW arbitration proceedings was called sometime on 28 February 2005. The arbitration proceeding is still continuing, with the claimant having closed its case sometime in April 2008.

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[11] It is also part of the evidence that on 7 March 2000 the plaintiff filed a suit in Kuala Lumpur High Court Originating Summons No. R1-24-18-2000 against EP Engineering claiming for a declaration that it was not bound to go to arbitration with EP Engineering, since the letter of award as regards the Chilled Water Systems subcontract did not include Bina Puri as a party. This application was dismissed by the High Court on 9 December 2003, and likewise on appeal to the Court of Appeal. The Court of Appeal decision is reported as *Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor* [2008] 3 CLJ 741.

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[12] I feel it is necessary to briefly state these background facts to emphasise the point that the letter of award as regards the subcontract as well as the letter of award as regards the principal contract were granted roughly 14 years ago. The works under the principal contract and subcontract started and the dispute arose between the parties sometime in 1998. The works had been completed in 1998.

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[13] Returning to this present dispute between Bina Puri and EP Engineering, it concerns obligations under a settlement agreement entered between the parties on 27 April 2004. This important document is exhibited as exh. P8 and it appears on pp. 24 to 29 of the common bundle of documents marked as "A".

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A [14] Looking at the sequence of events outlined earlier, the settlement agreement was entered into by the parties after the plaintiff's application was dismissed by the High Court, and the evidence suggests it was entered into as part of a global settlement involving both the DWW as well as the CWW.

B **The Relevant Terms Of The Settlement Agreement**

C [15] It appears from the recitals the settlement agreement that it was entered into after the filing of the appeal to the Court of Appeal against the decision of the High Court, as expressed in cl. 1.5:

1.5 Settlement.

D Subject to Clause 2 hereof, the parties hereto are desirous of entering into this Agreement to set out the manner and terms and conditions of settlement of the arbitration proceedings strictly with the admission of liability and without prejudice to the appeal and/or any appeal to the Federal Court arising from the appeal.

E [16] The relevant provision on which this dispute turns is cl. 2 of the said agreement, which deserve to be quoted *in extenso*:

2. Agreement

2.1 Subject to the provisions contained herein and without prejudice to any claim:

F (1) *In consideration of EP undertaking to apply to amend its points of claim in the arbitration proceedings to reflect the purported liabilities of BP contained therein as consequential to that of KHEC, BP will continue to be a party to the arbitration proceedings but may at its option elect not to participate in the same. In the same circumstances, EP agrees to bear all the arbitrator's fees and costs and expenses in relation to the arbitration proceedings on the part to be borne by BP excluding fees paid or payable by BP to its solicitors or counsel; and*

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H (2) In further consideration of the following covenants and undertakings by EP:

(i) Not to seek default award against EP in the arbitration proceedings; and

I (ii) In the event an award is made in favour of EP against KHEC and/or BP in the arbitration proceedings ("arbitration award"), not to enforce the arbitration award or commence execution proceedings against BP; and

(iii) Not to enforce any award of costs against BP in respect of KLHC Originating Summons No. R1-24-18-2000 in respect of the appeal and/or any appeal to the Federal Court arising from the appeal; and A

(iv) In the event KHEC seeks indemnity and contribution of the arbitration award from BP, to assist BP in contesting the said liabilities against KHEC in any court or arbitration proceedings; B

BP hereby agrees and undertakes, subject to Clause 2.2 below, to make available, at EP's written request, to EP all documents and documentation relating to the principal contract, the subcontract (if any, and/or EP's claim against the JV in the arbitration proceedings, including the following document: C

(vi) *JV's claims submitted by the JV pursuant to Clause 48 of the conditions of contract or the principal contract incorporating the claims made by EP ("the Final Accounts Claim");* D

(vii) *or any other documents or information relating to the principal contract or the works under the principal contract and/or the subcontract, if any, as EP may require for the arbitration proceedings* E

Provided Always that all documents and documentation requested by EP are in the actual possession of BP.

(3) In the event BP succeeds in the appeal and/or in any appeal to the Federal Court arising from the appeal, BP agrees not to enforce any order as to costs against EP whether made in the appeal and/or arising from the appeal. F

2.2 EP agrees to utilise the documents or information or claims referred to in paragraphs 2.1(2)(vi) and (vii) above, solely for the purpose of the arbitration proceedings and/or any legal or execution proceedings related thereto. All requests for documents or information should be made formally in writing under the scope of the arbitration proceedings. G

2.3 For the avoidance of doubt, the words "consequential" in Clause 2.1(1) and "assist" in Clause 2.1(2)(v) shall bear the meaning is as follows: H

(a) "consequential" means EP's purported liabilities to EP in consequential to KHEC's liabilities to EP and based on the joint-venture relationship between KHEC and BP; and I

- A (b) “assist” means EP agrees and undertakes to make available, at BP’s written request, to BP all documents and documentation and/or information relating to the subcontract and/or the works under the subcontract between EP and KHEC and cause papers of the arbitration proceedings.” (emphasis added)
- B

C [17] The plaintiff’s present claim is therefore grounded on cl. 2.1(1) and (2). On the basis of these provisions, the plaintiff is claiming against the defendant for the arbitration fees and costs which have been paid and due to be paid to Dato’ VC George as arbitrator in the CWW arbitration.

D [18] EP Engineering, as defendant, answers the claim by arguing that it is not bound to pay the arbitration fees and costs because Bina Puri has failed to hand over the promised documents to it pursuant to the settlement agreement and therefore Bina Puri has committed a fundamental breach of the settlement agreement.

E [19] On the facts, EP Engineering had earlier paid the sum of RM26,400 sometime on 16 May 2007; according to it, this was paid on the basis that it was willing to pay the arbitrator’s fees on condition the plaintiff performed its obligations under the agreement. EP Engineering is now counterclaiming for a refund of the sum.

F [20] The payment voucher in proof of this payment is exhibited as exh. P10, p. 30 of agreed bundle “A” (exh. P10).

The Agreed Issue To Be Tried

G [21] By consent of the parties, the main issue to be tried is stated as follows:

H Whether or not the Plaintiff has fulfilled its obligations to hand over to the Defendant, at the request of the Defendant, documents in relation to the Defendant’s arbitration against the Plaintiff and Kris Heavy Engineering Sdn Bhd including the documents as stated in Clause 2.1(2)(vi) and (vii) of the Settlement Agreement provided that the documents requested are in the actual possession of the Plaintiff.

[22] See para. 1(a) in bundle of documents “B”.

I [23] The subsidiary but related issues are:

- (a) Whether the settlement agreement has been validly rescinded by the defendant or whether the defendant remains bound by its terms and conditions.

(b) Whether the allegations of the defendant that the plaintiff has repudiated the contract is an attempt, strategy or an act of afterthought to release the defendant from the obligation to make payments of the fees and expenses of the arbitration to the plaintiff, as earlier agreed in the settlement agreement.

A

[24] It is agreed by the parties that the court should decide on the issue of liability first, and in the event the court finds in favour of the plaintiff, there shall then be an order that damages be assessed by the registrar.

B

The Witnesses

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[25] Altogether five witnesses were called by the plaintiff, as against two by the defendant. For the plaintiff, these were the witnesses:

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(1) PW1 (We Her Ching, Executive Director of the plaintiff).

(2) PW2 (Tan Kwe Hee, the Group Financial Director of the plaintiff).

(3) PW3 (Sujata Balan, previously a lawyer in Messrs Shook Lin & Bok, the solicitors for the defendant).

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(4) PW4 (Yong Chui Ling / Sandy Yong, General Manager, Legal Department of the plaintiff).

(5) PW5 (Aziaton binti Ahmad, at the material time the assistant to the Legal Manager, Sandy Yong).

F

[26] For the defendant, the two witnesses were:

(1) DW1 (Thomas Alexander Green, consultant of the defendant)

G

(2) DW2 (Gregorio M Atienza Jr, Senior Project Manager of the defendant)

[27] The focus of the testimony was on whether the plaintiff had supplied the documents requested by the defendant under the settlement agreement. On this single issue there has been a large measure of conflicting evidence, which has been compounded by the lapse of time since the first request was made in 2004.

H

[28] I am of course mindful that given the passage of time, recollection can be faulty and it will be necessary to test their recollection against the contemporaneous evidence and to then assess the inherent probabilities of each party's evidence.

I

A The Requests For Documents

[29] On the evidence there were two requests made; the first was in 2004, the second in 2008.

B *The 2004 Request*

[30] The evidence shows a facsimile message dated 9 July 2004 was sent from Sujata Balan (PW3), who was then a legal assistant of Messrs Shook Lin & Bok, to Aziaton binti Ahmad (PW5), the assistant to Sandy Yong (PW4), the Legal Manager of Bina Puri. This important document was tendered in evidence and marked as “P1”. That it was received by the Legal Department of Bina Puri on 9 July 2004 is not disputed.

[31] PW4 then circulated the message to PW1 and PW2 on 13 July 2004. According to PW4 (Sandy Yong) as well as PW1 (We Her Ching), the documents were obtained through PW1’s office, and there was a meeting between representatives of Bina Puri and EP Engineering at the premises of Bina Puri on 14 July 2004. Again it is not in dispute that (PW3) Sujata Balan, Thomas Green (DW1) and one unidentified chambering student from Messrs Shook Lin & Bok, attended for EP Engineering; Sandy Yong (PW4) and Aziaton (PW5) attended for Bina Puri. What exactly transpired is however hotly contested. It will be instructive and useful to quote the pertinent parts of the testimonial evidence to highlight the opposing positions. Selected questions and answers are underlined for emphasis.

For the Plaintiff

[32] PW1 (We Her Ching):
(During examination-in-chief)

- 1 Q : What happened on 13th July 2004?
A : I was shown a copy of a facsimile dated 9th July 2004 which was sent by the Defendant’s previous solicitor, Messrs Shook Lin & Bok to the Plaintiff’s staff, Cik Aziaton requesting for inspection of documents as listed in the facsimile ...
- 1 Q : What happened on 14th July 2004?
A : The Legal Manager of the Plaintiff, Ms Sandy Yong came to see me and informed me that representatives from the Defendant were here to inspect the documents. I gave the documents to her to pass on the same to the Defendant for their inspection. I was later informed by Ms Sandy

Yong that the Defendant wanted copies of these documents and photocopies of the same were made and handed over to them.

A

Pages 5 - 6 Notes of Evidence

(During cross-examination)

B

Q : Let's look at page 56 again. In your witness statement, you mentioned that you have sight of this fax on 14th July, can you explain what day was it this 14th July?

A : I can't remember.

C

Q : Please look at the fax, it was sent to Bina Puri and attention Cik Aziaton. Now who is Cik Aziaton in the Plaintiff Company?

A : Cik Aziaton is eerr ..., Assistant to Ms Sandy Yong.

Q : Is she still working for Bina Puri?

A : No.

D

Q : Still on the same fax, look at the bottom left hand corner, there is handwritten notation "supplied on 14th July ..." . Do you know whose handwriting is that?

A : Ms Sandy Yong.

E

Q : To the best of your knowledge, were you there at the meeting with Mr Tom Green and Ms Sujata?

A : No.

Q : So, in actual fact you do not know whether documents have been handed over to the Defendant here. I am talking about actual knowledge.

A : I have been informed by Ms Sandy Yong that the document had been handed over.

F

Q : Ya, but you were not at the meeting isn't it Mr Wee?

A : After their meeting I have been informed some document, they wanted.

G

Q : "Some document they wanted"?

A : The document they requested by the Defendant.

H

Q : So, all the information actually was given by Ms Sandy Yong?

A : Yes.

Q : And you were not there at the meeting?

A : No.

I

- A Q : Was there any letter from Bina Puri enclosing the requested documents to the Defendant?
 A : I don't know.

Pages 8 - 9 of the Notes of Evidence.

- B **[33]** W4 (Sandy Yong):

(During examination-in-chief)

- C Q : I refer to the document at page 24 to 29 of Bundle A. Pursuant to Clause 2.1(2) of the Settlement Agreement, the Plaintiff had agreed to make available upon written request being made by the Defendant all documents relating to the Arbitration provided the documents requested are in the actual possession of the Plaintiff. Did the Defendant make any request for any document prior to the commencement and conclusion of their case in the Arbitration Proceeding?

- D A : Yes. On 9th July of 2004, the Defendant through their solicitor Messrs Shook Lin & Bok send a fax to the Plaintiff requesting for inspection of documents listed in the fax.

- E 1 Q : I refer to the document on page 56 of the Bundle A, what is this document?
 A : This is the copy of the fax sent by the Defendant solicitor to the Plaintiff.

- F Q : I refer to the writing on the document at the top left hand corner and the bottom right hand corner. Whose handwriting is this?
 A : Mine.

- G 2 Q : Did you make the notes written on the fax?
 A : Yes.

- H 3 Q : When did you make the notations?
 A : The note on the top left hand corner on 13.7.2004 and the notation on the bottom left corner 14.7.2004 after the Defendants representatives had come and inspected and taken copies of documents.

- I Q : Did the Defendant come to the Plaintiff office to inspect the documents as stated in the fax?
 A : Yes. On 14th July 2004, Ms Sujata Balan solicitor from Messrs Shook Lin & Bok together with the Defendant representative, Mr Tom Green and another person came to inspect the documents and after inspection of the documents copies of the document as requested in the facsimile dated 9th July 2004 were given to them.

4 Q : Did you personally attend to the inspection of documents with the Defendant? A

A : Yes. After inviting the Defendant's representatives into the office, I went to see Mr We Her Ching (PW1), an Executive Director of the Plaintiff to obtain the documents as the documents were in his possession. Mr We handed the documents to me and I passed them over to the Defendant's representatives for inspection. At all times, my assistant Cik Aziaton was with the Plaintiff's representatives and made copies of documents for them from time to time. B

5 Q : How long did they stay? C
A : About 3 hours, I think.

Q : Did the Defendant request for copies to be made on the documents inspected?
A : Yes. D

10 Q : Were copies of the documents requested given?
A : Yes.

11 Q : Did you make any record of the inspection reply and supply document onto the Defendant? E
A : Yes, I make a note on a fax dated 9.7.2004 which was sent to me by the Defendant solicitor.

12 Q : Why did you make a record on this fax?

A : Firstly to confirm that the documents requested by the Defendant as stated in their fax have been inspected; next to record that the inspection took place on 14.7.2004 and not the proposed date as stated on the fax; finally to show that copy of some of the document inspected and requested by the Defendant were given to them. F

Pages 45 - 48 of the Notes of Evidence. G

(During cross-examination)

Q : Refer to page 56 of P1 the fax from Sook Lin & Bok. Also refer to Q & A no.5, 6 and 8. You said "the meeting is about 3 hours" and in Q & A no.8 you said "I think". Perhaps because of long laps of time. H

A : No, it is continuous 3 hours.

Q : Would you remember how many volumes of files were in the table for the Defendant's representative to inspect? I

A : There are a lot but I cannot remember how many volumes.

- A Q : You said that copies of the documents were given to the Defendant's representative. It's unfair to ask you how many pages but would you remember how thick the documents were?
 A : No.
- B Q : You can't remember?
 A : How thick is it? There are all in different files.
- Q : So, you gave them copies of those documents, so can you please inform the court how voluminous are those documents given to the Defendant?
- C A : I can't remember how thick, there are a lot of document they have requested.
- Court : Give us an estimate. Surely you should know. 10, 20, 30 or one room-full? How many?
- D PW4 : It has been quite some time already Yang Arif.
 Court : Just give us an estimate.
 ...
- E Q : Estimate how many pages? How many documents?
 A : How many pages? Of course I can't remember how many pages.
- Court : How many volumes?
- PW4 : How many volumes? Also I cannot remember how many volumes. It has been quite some time.
- F ...
- G Q : In your examination-in-chief, you said that you wrote the word "supplied the attach document from 14th July to Sujata, Tom Green and one guy coming with Tom Green". Am I right? This is your handwriting?
 A : Yes.
- H Q : Do you agree with me that in actual fact there was no hand over list of those documents to be acknowledged by the Defendant's representative. Would you agree?
 A : No.
- I Q : Would you agree that as a legally trained person, it would have been prudent for you to have a hand over list. Would you agree with me as a legally trained person?
 A : Not necessary.

Q : Apart from this notation which was written by you and nobody have known about it, any other written proof that you handed over these documents to the Defendant?

A

A : No.

Pages 49 - 51 of the notes of evidence.

B

[34] PW3 (Sujata Balan):

(During examination-in-chief)

Q : In July 2004, were you a Legal Assistant at Messrs Shook Lin & Bok?

C

A : Yes.

Q : I refer to document at page 56 of Bundle A – (P1). Do you recognize this document?

A : Yes. It is a copy of a facsimile dated 9.7.2004 that I sent to Ms Aziaton of the Plaintiff company setting out the documents which the Defendant wish to inspect at the Plaintiff's premises the following week.

D

1 Q : Is that your signature on the fax?

A : Yes.

E

Q : Did you accompany the Defendant's representatives to the Plaintiff's premises to inspect documents pursuant to the facsimile?

A : Yes, I accompanied Mr Tom Green, a consultant of the Defendant company to the Plaintiff's premises on 14.7.2004 to inspect documents.

F

1 Q : Do you recall inspecting documents at the Plaintiff's premises?

A : Yes.

G

1 Q : Where did the inspection take place?

A : In a meeting room at the Plaintiff's premises

1 Q : Was any representative from the Plaintiff present at the inspection?

A : I cannot recall.

H

1 Q : How long did the inspection take?

A : I am not certain of this.

Q : Do you recall the Plaintiff making copy and passing documents to the Defendant?

I

A : I cannot recall.

A Pages 39 - 41 of the notes of evidence.

(During cross-examination)

Q : When did you resign from Shook Lin Bok?

A : I believe it was in August 2005.

B

Q : Were you in charge of this particular file?

A : I was in charge very briefly.

Q : Did you appear in any arbitration proceedings between the Plaintiff and the Defendant?

C

A : No, I did not.

Q : Let's look at exh. P1 at page 26. My instructions is that the Defendant here EP Engineering did not receive this fax, do you agree?

D

A : I have no knowledge of that.

Q : But can you just confirm whether it was c.c to the Defendant based on fax?

A : Err., it appeared to be so.

E

Q : Where does it say c.c to EP Engineering?

A : Oh I see. N, it doesn't say that.

Q : But you remember sending this fax?

A : It was 8 years ago, I can't remember sending the fax but the signature is mine.

F

Q : Having sent out this fax, was there any telephone conversation between you and Cik Aziaton from Bina Puri?

A : I am sorry I cannot remember

Q : You cannot remember?

A : Ya.

G

Q : But you remember going to the Plaintiff's office?

A : Yes.

Q : Did you travel alone or did you go with anybody?

H

A : As I recall, I travelled with Mr Tom Green and a chambering student of Shook Lin & Bok at that time.

Q : Do you have the name of the chambering student?

A : I am sorry I can't remember.

I

Q : You said that in your answer to Q & A no.8 that "How long did the inspection take?" and you said "I am not certain of this". At the meeting room, were there a lot of files being shown to you?

A : Again I apologise I cannot remember, I do remember seeing some documents, I can't remember whether there were many files shown to us.

A

Q : You can't remember how long you were there?

A : No, I am sorry I can't.

B

Q : Refer to Q & A No.9. The question was "Do you recall the Plaintiff making copy and passing documents to the Defendant? And you said "I cannot recall". Would you remember whether there was any hand-over letter from Bina Puri to Plaintiff when they asked you to sign to say that these are the documents?

C

A : I cannot remember.

Pages 41 - 43 of the notes of evidence.

[35] PW5 (Aziaton)

D

(During examination-in-chief)

1 Q : What was your position in the Plaintiff at the time?

A : I was the Assistant to the Legal Manager of the Plaintiff, Ms Sandy Yong.

E

2 Q : What happened on or about 9.7.2004?

A : I received a telephone call from Ms Sujata Balan, a lawyer from the Messrs Shook Lin & Bok who was the solicitor acting for the Defendant at the time.

F

3 Q : What was the telephone conversation about?

A : It was regarding an arbitration before Dato VC George where the Defendant had a dispute against the Plaintiff and Kris Heavy Engineering Sdn Bhd ("KHEC") in respect of a subcontract for Chilled Water Works. Ms Balan informed me that the Defendant and their lawyers would like to come to the Plaintiff's office the following week to inspect documents relating to the arbitration.

G

4 Q : What happened subsequently?

A : I received a facsimile from Ms Sujata confirming the appointment to inspect documents. The fax also specified the documents the Defendant wished to inspect.

H

5 Q : I refer to the document P1 at page 56 of Bundle A, what is this document?

A : This is a copy of the facsimile dated 9.7.2004 which was sent by Ms Sujata to me confirming the telephone conversation and specifying the documents requested for inspection.

I

- A 6 Q : What happened on 14.7.2004?
 A : On 14.7.2004, Ms Sujata Balan together with the Defendant's representative, Mr Tom Green and another person came to the Plaintiff's premises to inspect the documents.
- B 1 Q : Where did the inspection take place?
 A : At the meeting room on the 1st floor of the Plaintiff's office at Wisma Bina Puri, 88, Jalan Bukit Idaman 8/1 Bukit Idaman, 68100 Selayang.
- C 1 Q : Were you present at the inspection of documents by the Defendant?
 A : Yes. I was present at the inspection.
- 1 Q : Did you play any part in the inspection of documents by the Defendant?
 A : I was present at the inspection to observe the inspection and to make sure the documents are intact and kept in order. From time to time, the Defendant will hand me certain documents and asked for photocopies to be made whenever they wanted copies of same.
- D 1 Q : Were photocopies of the documents made and given to the Defendant each time a request was made?
 A : Yes. Each time the Defendant asked for copies of document(s), I personally made photostat copies of the document(s) requested and handed them over to the Defendant.
- E 1 Q : How was the request for documents made?
 A : It was an ongoing request during the inspection of documents. As the Defendant inspected the documents, from time to time, they will inform me that they wanted copies of the document being inspected and handed the document(s) over to me for copies.
- F 1 Q : At the time the Defendant handed to you the document to make copies, how were the documents handed to you? Were they part of a ring folder and the document tag or were they individually taken out of the ring folder?
 A : No, it was tagged from whatever pages they needed from the file they tagged it and I was actually bring out all the whole file and photocopied.
- G 1 Q : What happened to the document after they were taken out for the Defendant for inspection after the Defendant's representative left?
 A : We return it to PW1 because it belongs to contract department.
- H 1 Q : ...
 A : ...
- I 1 Q : ...
 A : ...

Q : Can you briefly tell us what the contract department has to do with the contract document? A

A : Basically whatever documents they requested is actually meant from the contract department which I have no idea about.

Q : In the course of the inspection of the documents, you said you did not play an active part and just to keep on eye, apart from the document that were given over to the Defendant, did the Defendant ask you for any other additional documents to inspect? B

A : No, basically whatever were brought in that day there were quite I think more than 10 files were brought in ... C

Q : How long did the inspection take?

A : About 3 to 4 hours.

Q : When did you leave the Plaintiff's employment? D

A : 6.8.2004, that year itself.

Pages 63 to 67 of the notes of evidence.

For The Defendant

[36] DW1 (Thomas Green): E

(During examination-in-chief)

Q : I refer you to page 56 of bundle A. Do you have any knowledge about this facsimile?

A : No. F

Q : I refer you to the same facsimile. Can you read out the part which was handwritten?

A : Supplied the attached documents on 14.7.04 to Sujata, Tom Green and one guy coming with Tom Green.

1 Q : Is the statement true? G

A : No. I have no recollection of being supplied with any documents by the Plaintiff.

Q : Do you have any recollection of attending the Plaintiff's offices on the 17th July 2004?

A : I visited the Plaintiffs offices in Selayang on 3 or 4 occasions but cannot recall the exact dates of the visits. H

Q : Please refer to page 56 of the same bundle. Look at item 3. Also refer to page 33 - 34 of the same bundle. Look at the page number in circle, a letter dated 8.9.2008. Have you seen the letter in pages 33 - 34? I

A : Yes.

A Q : Please turn to page 34, item 12. Is item 12 the same as item 3 at pages 56?

 A : Same item.

 Pages 75 to 76 of the notes of evidence.

B (During cross-examination)

 Q : Ok, question 6 again so you have now said 14th July your answer is "I visited the Plaintiffs offices in Selayang on 3 or 4 occasions but cannot recall the exact dates of the visits". Now can you at least recall the purposes of this visit?

C A : The first visit was prior to the Settlement Agreement. The second visits were to do with the document inspection.

D Q : So you did appear eerr., did or at some time or rather you attended to the Defendant premises to look at the document?

 A : Yes.

E Q : At the occasion and instances where you inspected the document did you asked for any of the document to be made?

 A : Had they produced documents which were supportive of EP's case, I would have asked for documents and the documents would be presented in the arbitration.

F Q : When you said "presented in the arbitration" what do you mean?

 A : They have been introduced into the arbitration to show those documents.

G Mr Philip Chai : O.k ya. Before they could do that the Plaintiff company will have to make give you a photocopy of that document for you to introduce that.

 DW1 : That's correct.

 Q : Have there been instances you have done so?

 A : No.

H Q : Have you not identified any document that could assist you in this case?

 A : No.

I Q : Bina Puri however showed you documents but in those documents you couldn't find any evidence that could support the Claimant's claim. Is that correct?

 A : Right.

- Q : Therefore in respect of those documents that you do not wish to use, no request of copies have been made? A
- A : No.
- Q : Do you recall attending a meeting whether on 14th or any other date with one Cik Aziaton or Ms Sandy Yong at the Plaintiff's office? B
- A : There was a lady present.
- Q : Two pretty girls for you to recall.
- A : One was a mature lady, that's the only lady I can recall.
- Q : Do you recognize anybody here who present at the meeting? C
- A : No, I can't recall who physically at the meeting but there was a meeting.
- Q : Refer to Q & A No. 4. You answered regarding the supplies of documents where you said "I have no recollection of being supplied with any documents by the Plaintiff". In light of your answer just now, would you want to rephrase your answer in light to what to what you just answered? D
- A : No sir, I have no recollection of inspecting document. E
- Q : About 5 minutes ago, you said you attended at Bina Puri to inspect documents.
- A : I went there with the intention of inspecting documents to see if there were documents which will support my client case in the arbitration. I have no recollection of inspecting documents, there was no document have been given or produced. F
- Q : So, what documents did you see at the meeting?
- A : I have no recollection.
- ...
- Court : Before that I want to know, ... Mr Green, you were there? G
- DW1 : I was there.
- Court : What were you doing there? H
- DW1 : I have gone there to see if any of the documents in the possession of Bina Puri were [12:21:45] to my client in the arbitration.
- Court : So you cannot recollect whether any document was shown to you? Is that your answer? I
- DW1 : On my first visit or second visit the documents were not available, there were somewhere else, there were not in that building.

- A Court : Were any documents made available to you?
 DW1 : Not that I can recall.
- Q : Ok Mr Green, you said you cannot recall, so you agree
 with me that cannot recall would it mean that it may also
 been the case that documents were produced?
- B A : Yes.
- Q : In other words you just cannot remember?
 A : I cannot recall if there were documents that would be
 beneficial to my client, I would have taken copies and I
 would present it in the arbitration.
- C Pages 78 to 81 of the notes of evidence.
- [37] DW2 (Gregorio M Atienza Jr)
- (During cross-examination)
- D Q : Is that the document that mark as Exhibit P1?
 A : Yes
- Q : This is a copy send by Shook Lin to Ms. Sandy Yong?
 A : Yes
- E Q : Did you attend to the inspection of documents?
 A : No
- Q : Did you instruct the solicitor to fax to Plaintiff?
 A : No
- Q : When did you come across this document?
F A : During on the course of this trial.
- Q : Never seen the document before this trial?
 A : No
- Q : You have no knowledge regarding this fax?
G A : No
- ...
- Q : You do not have any knowledge whether any documents
 were handed over?
 A : That's right.
- H At pages 108 to 110 of the notes of evidence.
- [38] As can be readily appreciated from the above passages in
 the notes of evidence, there is a major divergence between the
 testimony of Thomas Green and that of Sandy Yong and Aziaton.
- I While Sujata Balam's testimony is firm on there being an
 "inspection", there are meager details provided since this particular
 witness could not recollect much given the passage of time and
 her resignation from Shook Lin & Bok.

[39] Thomas Green appears to emphasise there was no “inspection” of documents. A

[40] Gregorio Atienza’s testimony is of no assistance in this regard since at the material times the witness was not yet employed by EP Engineering. B

The 2008 Request

[41] The evidence establishes a lapse of four years before the second request for documents was made on 8 September 2008. The relevant evidence is exh. D2, at pp. 28 - 29 of the Agreed Bundle of Documents “A”. The covering letter is short but the list of documents appended is long. The letter states: C

Pursuant to part of the above referenced Agreement, particularly Part 2.1(2) EP requests Bina Puri to make available documents in accordance with the attached list. These documents are required as a matter of urgency and have been requested during the arbitration process. D

Should Bina Puri wish to challenge any specific request on any grounds or if Bina Puri contends that any such documents are not in its possession, EP suggest a meeting be convened during the week ending 12th September 2008 to discuss how such documents may be discovered in order to preserve the above referenced Agreement. E

[42] In terms of the exact sequence of events, this letter was sent after Messrs Philip Chai & Co, solicitors for Bina Puri, had written to EP Engineering on 10 June 2008 requesting for payment of RM79,912 as the remaining balance of arbitration costs payable as at December 2007. See exh. P11. F

[43] There was no reply to the plaintiff’s letter of this date. There was however a reply to the defendant’s letter by the plaintiff’s solicitors by letter dated 12 September 2008, by which the plaintiff informed the defendant that it could not accommodate the defendant’s request for a meeting on that date to discuss the discovery of the documents. The defendant was also informed that the plaintiff could not accommodate the request in view of the Chinese New Year celebration since the plaintiff’s representatives had gone on leave and would only be back after the next week, and further the plaintiff would also need time to look for the documents requested. As such, the plaintiff requested an extension of time until after the Hari Raya holidays to revert and meet with the defendant’s representatives. G
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- A **[44]** It is common ground that no follow-up meeting occurred.
- [45]** In terms of documentary proof, the evidence presented by the parties show the following:
- B (a) 9 February 2010 - another letter of demand were sent by Philip Chai & Co to the defendant demanding the payment of RM 129,687, being arbitration fees, to be paid within seven days from the date of the letter of demand.
- C (b) 13 April 2010 - a letter from EP Engineering to Bina Puri stressing that it was fundamental that Bina Puri make available to EP Engineering all documents as may be formally requested in writing by EP Engineering under the arbitration proceedings; the latter protested that despite numerous reminders and follow-up and Bina Puri's promises to meet with representatives of EP Engineering, the requested documents had not been furnished and had greatly prejudice EP Engineering's case in the arbitration. This letter appears as exh. "P14". This letter ends by EP Engineering stating its position that Bina Puri's "conduct in the arbitration proceedings" and its "failure in furnishing these documents" constituted "continuing breaches of fundamental terms of the said agreement, amounting to a repudiation of the said Agreement "which we hereby accept". This letter ends by stating:
- E
- F 10. Accordingly, we consider ourselves discharged from performing any of the obligations under the said Agreement and/or consider the said agreement as rescinded.
- G 11. In addition thereto, we would also add, without limitation or prejudice to our acceptance of your repudiation, that your undertaking to disclose the requested documents and those is outlined in Clause 2.1 (2) (vi) & (vii) of the said Agreement, is in fact a duty in law as these documents are relevant documents in the arbitration and have to be disclosed pursuant to your general obligations in disclosure and discovery. Likewise, your undertaking to continue to be a party in the arbitration proceedings is in any event an obligation in law by virtue of the then existing High Court dismissal of the application asserting that you were not a party to the subcontract.
- H
- I

12. Accordingly, your promise to perform obligations which you are required to perform in any event under law does not amount to any consideration at all. As such, the said Agreement has construed by us to be void and unenforceable.

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- (c) 11 August 2010 - letter from Philip Chai & Co on behalf of the plaintiff denying the allegations in the defendant's letter. The solicitors expressly informed the defendant's solicitors that the plaintiff strongly denied that it had repudiated the settlement agreement and therefore rejected the defendant's attempt to rescind the contract. The plaintiff took the view that the defendant continued to remain bound by the provisions of the settlement agreement. See exh. "P15".

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- (d) 7 January 2011 - letter from Messrs Dennis Nik & Wong, the defendant's solicitors, in reply to Philip Chai & Co, reiterating that the plaintiff had failed and/or refused to provide the documents and therefore there was a total failure of consideration on the plaintiff's part, resulting in a fundamental breach of the settlement agreement and as such the defendant was entitled to rescind the agreement and therefore would not be bound by its provisions. The plaintiff, Bina Puri, was informed that the solicitors had instructions to commence legal proceedings.

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Evaluation Of The Law And The Evidence

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[46] In the course of submission, counsel for the defendant argued that on the facts of this case, there was a breach of condition which entitles the innocent party, ie, the defendant in this case, to treat the supplemental agreement as repudiated. Whether a particular term in the contract is a condition or a warranty is a matter of judicial impression and therefore a question of law; *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231.

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[47] Further to that, defendant's counsel also referred to s. 40 of the Contracts Act 1950 to argue that there was a total failure of consideration on the part of the plaintiff. Section 40 reads:

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When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words of conduct, his acquiescence in its continuance.

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- A [48] The Federal Court decision in *Damansara Realty Berhad v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257 is cited for the proposition that the issue of whether an innocent party can take a contract as having been repudiated is a question of fact, depending on the facts and circumstances of each case. The main consideration is whether or not there has been a total failure of consideration, in other words, a failure to perform a promise “in its entirety”. The following passage cited:

C As such the principle should therefore be this. There is a total failure of consideration (and the failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project as having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract as having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there was a right to terminate the contract, but not in the latter instance.

- E [49] There is no dispute between the parties on the applicable principles of law. The dispute in this case is really on the evidence and the conclusions to be drawn from the evidence.

- F [50] I do not believe there is much of a dispute on whether or not the obligation to supply documents when requested is a condition or a warranty. Given the circumstances, and as a matter of judicial impression, this obligation is a condition of the settlement agreement. However, it is also necessary to ascertain, as a matter of law, what precisely is that obligation within the context of the settlement agreement. In this regard, the important proviso to cl. 2.1(2) becomes all important:

G Provided Always that all documents and documentation requested by EP are in the actual possession of BP.

- H [51] Hence the obligation to disclose and provide the necessary documents is conditioned upon Bina Puri having actual possession of the documents. This is a question of fact on the evidence.

- I [52] The same can be seen on the issue whether there has been a total failure of consideration arising from the failure by the plaintiff to disclose the necessary documents. In the words of s. 40 of the Contracts Act, has been a failure to perform a promise “in its entirety”.

[53] Since it is the defendant that has raised this issue of total failure of consideration, the burden is on the defendant to establish the issue. Having considered the entirety of the evidence, both testimonial and documentary, I find the evidence for the defendant to support its case to be particularly weak. This is particularly so in relation to the documents requested in July 2004. I find it most surprising that Thomas Green (DW1) could not afford much assistance to this court in this connection. His evidence is uncertain and unreliable, and further is flatly contradicted by the testimonial evidence of PW3, PW4 and PW5. Although documentary evidence to support the plaintiff's version of the facts is scarce, nevertheless the contemporaneous handwritten notation by Sandy Yong on the facsimile message sent to Aziaton by Sujata Balan establish on the preponderance of probabilities that there was an inspection of documents and copies were made for the defendant. As indicated earlier, DW2 is of no assistance whatsoever in this regard, since he was not as yet employed by the defendant at the material time. Looking at the totality of the facts and circumstances of the case, there is no evidence of any protest being lodged or any follow-up action taken by the defendant after this inspection of the requested documents until four years later in April 2008. By the defendant's own argument, some of the documents requested in 2008 overlap with those in the 2004 request. For instance, item 12 in exh. D2 is the same as item 3 in exh. P1. See the relevant testimony of DW2 at p. 104 of the notes of evidence (during examination-in-chief):

Q18 : Can you tell the court, why did the Defendant request for the documents listed in the list attached to the letter dated 8.9.2008?

A18 : Those documents were necessary in the Arbitration proceedings to show amongst others, how much was actually paid by MAS for each claim.

Q19 : Please refer to page 56 of Bundle A which is the facsimile dated 9.7.2004, and also to page 34 of the same bundle which is the list of documents referred to earlier. Can you tell the court, are the documents requested in these two occasions the same?

A19 : The documents requested in the facsimile in 2004 are also listed in the list of documents in 2008. To illustrate, Item 1 of the facsimile dated 9.7.2004 is similar to item 1 to 8, 11 and 13 in the list of documents, item 2 of the facsimile is similar to item 10 in the list and item 3 is similar to item 12 in the list.

A Q20 : Why did the Defendant request for the same documents in 2008?

A20 : Simply because the Plaintiff failed to furnish the Defendant with the documents requested in 2004. Therefore, the Defendant had to request for the documents again in 2008.

B There was no need for the Defendant to request for the same documents in 2008 if the Plaintiff had provided the same to the Defendant in 2004.

[54] Since in all probability there was an inspection of the documents done in 2004, and copies were made, it can only be reasonable to surmise that the subsequent request in 2008 was not a *bona fide* attempt at discovery of documents to facilitate the defendant's conduct of the arbitration. It was made after the defendant had closed its case and was justified only on the ground that these documents were necessary for cross-examination of KHEC's witnesses. Further, there is evidence to establish the defendant also wrote to KHEC on 19 November 2008 for discovery of the very same documents, see exh. P19. DW2 also confirms documents were obtained from KHEC:

E (During cross-examination at pp. 111 to 112, notes of evidence)

Q : You can only claim if you have knowledge how much was paid by MAS?

A : We know how much MAS paid.

F Q : Would you agree you would need to know the details before you can make allegation?

...

Q : I put it to you, you already have the information regarding the payment that been made by MAS to Kris Heavy.

G A : We only have the summary and not the detail.

Court : Where do you get the documents from?

A : From Kris Heavy.

H Q : Pg 3 - 7, this is the point of claim before it was amended?

A : Yes.

Q : On Pg 8 - 9 after the amendment, you are able to provide details of the claims and on Pg14, this figure can only obtained if you have the documents?

I A : This is the amount what we have done and nothing to do with MAS.

Q : Your claim is actually against Kris Heavy?

A : Yes.

[55] The documents requested were documents related to the CWW. Aside from KHEC, DW2 also confirms in his testimony that the defendant had also attempted to obtain the documents from the SO and his representative, Bala Nair, was called as a witness in the arbitration, but this witness stated that these documents were unavailable since they had been destroyed. See the cross-examination of DW2 at p. 116 of the notes of evidence.

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[56] The issue ultimately comes down to whether the requested documents, apparently not fully available from KHEC or the SO, are in the possession of the plaintiff and the plaintiff has purposely refused to supply them. Despite maintaining to the contrary earlier in his examination in chief, DW2 in cross-examination appeared to concede that the plaintiff had attempted to arrange a meeting with the defendant, but unfortunately the parties could not find a suitable time. This version of the facts is also found in the testimony of PW1 and PW4.

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[57] It is also significant to note DW2, again despite earlier statements to the contrary in examination-in-chief, conceded in cross-examination that the plaintiff was not a direct party in the CWW, and KHEC would have been in a better position to produce the documents.

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[58] Given the facts and circumstances, and the documentary and testimonial evidence seen in totality, it is more probable that the plaintiff's version of the facts is true, ie, the requested documents are not actually in its possession, and therefore the proviso to cl. 2.1(2) of the settlement agreement should apply.

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Conclusion

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[59] As indicated earlier in this judgment, the applicable law in this dispute is agreed. The dispute turns on findings of facts to be derived from the entirety of the evidence. Having evaluated the respective evidence of the parties, I am satisfied that the plaintiff has established its claim on a balance of probabilities. On this standard of proof, any commercially sensible purpose will conclude that the plaintiff has taken adequate steps to comply with its contractual obligations under the settlement agreement. It could not provide the documents requested in 2008 because these were not in its actual possession. But it did provide the documents in its possession in 2004, despite claims to the contrary by DW1, whose recollection of events has been somewhat suspect.

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- A** **[60]** The claim of the plaintiff (Bina Puri) as prayed in prayers (1), (2) and (3) of the statement of claim is therefore allowed with costs of RM30,000. In relation to prayer (3), the interest awarded shall be at 4% per annum. The counterclaim of the defendant is accordingly dismissed. It is further ordered that the damages
- B** suffered by the plaintiff under prayer (2), ie, further arbitration costs payable to the arbitrator from 10 February 2011 until the conclusion of the arbitration, be assessed by the Deputy Registrar of this Court.
- C** **[61]** Further order that the claim of the defendant (as plaintiff in Originating Summons Suit No. 24NCVC-483-2011) be hereby dismissed.

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